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ARTICLE

WHY THE CATHOLIC MAJORITY ON THE SUPREME COURT MAY BE UNCONSTITUTIONAL

MICHAEL J. GERHARDT*

I. INTRODUCTION

I agree with my fellow participants in this Symposium that the fact that the current Supreme Court has five Catholics—the most it has ever had at one time—is a positive, significant achievement for Catholics in the United States; however, I must otherwise dissent. I hasten, at the outset, to emphasize that there is nothing wrong with the fact that we currently have five Catholics on the Supreme Court. To the contrary, I agree the Catholic majority is strong evidence of many welcome developments: the shattering of the glass ceiling impeding Catholics from holding some of the highest public offices in the United States, the possible weakening and containment of longstanding anti-Catholic bias in our society, and the rise of a vigorous Catholic intellectual tradition in the United States. In all likelihood, it is also evidence of the disproportionate numbers of Catholics among the small group of people from which the last three Republican presidents selected their respective Supreme Court nominees. These developments are encouraging and noteworthy, but they hardly tell the whole story of how, or why, we have a Catholic majority on the Roberts Court. We know, as Sheldon Goldman explains, that presidents Reagan, George H. W. Bush, and George W. Bush had specific political objectives in making their respective Supreme Court appointments;¹ however, the critical question is whether the criteria these presidents used to implement their objectives included the nominees' conformity with particular religious beliefs or traditions.

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1. See Sheldon Goldman in this volume, *The Politics of Appointing Catholics to the Federal Courts*, 4 U. ST. THOMAS L.J. (forthcoming June 2007).

In this Article, I examine two ways in which our national leaders may have damaged the rule of law in the course of appointing the current Catholic majority on the Roberts Court. First, in their zeal to control the Court through their appointments, our national political leaders may have demonstrated (perhaps unintentionally) a regrettable lack of faith in the rule of law. Their approach to selecting justices possibly evinced an apparent agreement with most political scientists who believe that justices do not follow the law, that law in the form of precedents does not constrain justices from either directly voting their policy preferences or manipulating precedent to maximize their personal or political preferences. Presidents Reagan, George H. W. Bush, and George W. Bush—and many Republican senators in 2005–2006—wanted to do what other previous leaders had failed to do: end liberal judicial activism, do away with the Supreme Court precedents they did not like, and transform the federal courts, particularly the Supreme Court, into consistent, if not enduring, conservative bastions. To achieve those objectives, they could not depend on the law to constrain justices to interpret the Constitution as they preferred. To the contrary, the people in charge of selecting Supreme Court nominees had to find justices who would rigidly adhere to their ideological preferences, and thus perform consistently with the expectations of the dominant social science models of the Court. Fulfilling the expectations of the nominating presidents came at the expense of our longstanding commitment to—and faith in—the principle that ours is a government of laws and not of people, even if those people had the right kinds of ideological (or religious) commitments. Insisting that the maintenance of a government of laws depends on appointing people with the right kinds of ideological commitments sacrifices another principle on which our faith in our system as a government of laws in turn depends, a principle which I call the golden rule of constitutional law: on the Supreme Court, justices recognize that they must treat others' precedents as they would like their precedents—the ones with which they approve—to be treated. Those who purport to speak truth to power must assess the possible damage done to the rule of law and the golden rule of constitutional law by the repeated insistence that ideology matters more than law.

A second, serious problem with the process through which we acquired a Catholic majority on the Court may have been that some, if not all, of the appointments which made it possible may have been unconstitutional. The selections of at least some of these justices may have been unconstitutional—possibly violating Article VI's express prohibition of religious tests for federal office, the Fifth Amendment's Due Process Clause, or the First Amendment's prohibition against the establishment of religion—because they might have been deliberately based in part on the nominees' religious convictions. The possible, ensuing violations are all the more unfortunate because it would have been easy to assemble a Catholic

majority on the Court without sacrificing some of our constitutional commitments.

After assessing the possible damage done by the Supreme Court selection process to the rule of law, I conclude with some modest suggestions for future Supreme Court selection. The first is abandoning loaded, or coded, rhetoric in public discourse. While President Bush and others may have used references to "character" or "heart" to avoid open warfare over recent Supreme Court nominations, these references simply empowered the small constituency to whom they were addressed. Otherwise, the references possibly deceived, or misled, the rest of the American people. Second, we need greater candor in the selection process. Presidents and senators ought to specify, as openly as possible, their respective criteria for evaluating Supreme Court nominees. If ideology is important to them, they ought to say so, and they ought to explain which ideology they prefer and why. If character matters to them, they need to explain what they mean by character, why it ought to be important in Supreme Court (or other judicial) selection, and whether "character" as they understand it works to the benefit of nominees of both parties or only the nominees of one particular party's president. Last, but not least, our leaders should take the rule of law seriously and not as a convenience. Over the past quarter century, our national leaders have often professed their respect for the rule of law—whether it be in the Clinton impeachment proceedings, the policies designed to thwart terrorist attacks against the United States, or the judicial selection process. The rule of law includes the Constitution as well as the Court's rulings and the golden rule of constitutional law. We expect our justices to respect and to abide by the rule of law. We expect our leaders to do the same. The choice of Supreme Court justices is no exception, and should be done pursuant to the rule of law. Religion should have nothing to do with it.

II. THE WRONG MESSAGE

For many years, political scientists have sharply differed with legal scholars over the extent to which the law, particularly in the form of judicial precedents, actually constrains justices' decision-making in constitutional adjudication.² If the law actually had the power or force to constrain justices, then presumably it ought not to matter which people sit on the Court, for it would presumably have sufficient force to keep them on the straight and narrow. To put this differently, if ours really is a government of laws and not people, then it would follow that the leaders of the institutions of our federal government, including the Court, would follow the law and not their personal or political preferences. Yet, based on extensive empirical

2. For a basic overview of political scientists' models of the Supreme Court, see *SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES* 75 (Cornell W. Clayton & Howard Gillman eds., 1999).

fact-finding, political scientists claim that the justices either directly vote their policy preferences or manipulate precedent (and other legal materials) to maximize their personal preferences.

Regardless of whether these findings of political scientists are correct, it appears that many presidents and senators may agree with them. In fact, presidents have cared about the “politics” of their nominees, and most—if not all—presidents have tried to pick people based on how they would likely vote on the great constitutional issues of the day.³ George Washington was the first (but not the last) president to do this: all fourteen of the people he nominated to the Court, including the ten who eventually served there, had been selected in part because they had been “reliable, cautious, conservative adherents to the Federalist cause” and demonstrated “support and advocacy of the Constitution.”⁴ Other presidents have followed suit, selecting people who shared their constitutional philosophies. This is, for instance, what John Adams did when he appointed John Marshall and the “midnight judges” near the end of his presidency (as well as two other Supreme Court appointees)—all done to fortify the federal courts with people “of strong Federalist persuasion” to overrule or weaken what they regarded as the “radical” policies of the Jeffersonians.⁵ Millard Fillmore, too, did this when he nominated the first Jew to the Court—Judah Benjamin.⁶ Benjamin’s being Jewish had little or nothing to do with his nomination. Fillmore picked Benjamin because he figured Benjamin shared his constitutional philosophy and the Senate would defer to his nomination since he was a newly elected senator from Louisiana and the Senate traditionally deferred to the nominations of senators to confirmable offices. As president, William Howard Taft (and his Attorney General) closely scrutinized nominees’ backgrounds and beliefs to ensure that all six of his appointees to the Court had the right ideological commitments (to protect property rights, among other things).⁷ Woodrow Wilson nominated Louis Brandeis in 1916, in spite of, rather than because of, the fact that Brandeis was Jewish.⁸ Wilson liked Brandeis’ politics. He expected Brandeis to be a progressive force on the Court, and Brandeis was. But Brandeis did not get there before enduring an intense, six-month-long Senate confirmation battle marked by anti-Semitism. When more than a decade later President Hoover had a vacancy to fill, he initially resisted Senate pressure to appoint another Jew—Benjamin Car-

3. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (rev. ed. 2003).

4. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 71, 72 (2d ed. 1985).

5. *Id.* at 80.

6. *Id.* at 111.

7. *Id.* at 163–73.

8. *Id.* at 178–81.

dozo.⁹ Hoover understood that Cardozo was likely to join the progressive wing of the Court, but he was concerned that Cardozo's appointment would put two New Yorkers and two Jews on the Court, upsetting the geographical and religious balance of the Court. In the end, Hoover acceded to the will of the Senate. Subsequently, Franklin Delano Roosevelt picked nine justices based in part on their proven commitment to upholding the constitutionality of the New Deal.¹⁰

Since 1980, all three Republican presidents have expressed the same desire to appoint justices committed to thwarting liberal judicial activism, construing congressional powers narrowly, weakening—if not overturning—*Roe v. Wade*,¹¹ lowering or dismantling the wall of separation between church and state, and strengthening protection of private property rights. Their collective quest has been to devise flawless criteria for identifying people who had, would maintain, and would rigidly follow their preferred ideological commitments over time.¹²

Looking at the patterns in the past three Republican presidents' Supreme Court nominations provides further insights into their criteria for ending the liberal judicial activism with which they associated the Court, and for producing a Court with a majority to rule as they preferred. First, five of the last eight Republican appointees to the Court—and seven of the last eleven Republican Supreme Court nominees—had extensive experience in the executive branch.¹³ Second, all eight of the last eight Republican Supreme Court appointees—and ten of the last eleven Republican Supreme Court nominees—had been sitting judges prior to their nominations to the Court.¹⁴ Third, five of the last eight Republican Supreme Court

9. *Id.* at 201–05.

10. *Id.* at 206–36.

11. 410 U.S. 113 (1973).

12. See, e.g., Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences and Constitutional Change*, 78 IND. L.J. 363 (2003) (describing the concerted efforts and consequences of President Reagan to transform the Supreme Court).

13. The last eleven Republican nominees to the Court and their respective executive experience have been John Roberts (Deputy Solicitor General, Associate White House Counsel, and Assistant to the Attorney General); Samuel Alito, Jr. (assistant to the Solicitor General, U.S. Attorney, and Deputy Assistant Attorney General); Harriet Miers (Chief White House Counsel); Clarence Thomas (assistant secretary); David Souter (New Hampshire Attorney General); Anthony Kennedy (no formal executive experience); Robert Bork (Solicitor General); Douglas Ginsburg (Assistant Attorney General); Antonin Scalia (Assistant Attorney General); William Rehnquist as Chief Justice (Assistant Attorney General); Sandra Day O'Connor (no federal executive experience but brief stint as county attorney).

14. The ten Republican nominees and their respective federal judicial experience have been John Roberts (judge on the U.S. Court of Appeals for the District of Columbia); Samuel Alito, Jr. (judge on the U.S. Court of Appeals for the Third Circuit); Clarence Thomas (judge on the U.S. Court of Appeals for the District of Columbia); David Souter (judge on the U.S. Court of Appeals for the First Circuit); Robert Bork and Douglas Ginsburg (both judges on the U.S. Court of Appeals for the District of Columbia); Anthony Kennedy (judge on the U.S. Court of Appeals for the Ninth Circuit); Antonin Scalia (judge on the U.S. Court of Appeals for the District of Columbia);

appointees were Catholic, and Republican presidents appointed all five of the current Catholic majority on the Court.¹⁵

While President Clinton named two justices whom he expected would support a right of privacy, including *Roe*,¹⁶ President George W. Bush set out, clearly and deliberately, to do the opposite. He was anxious not to make the mistake his father had made in choosing David Souter, who has become reviled among conservative Republicans as a traitor for becoming one of the Court's most liberal justices. President Bush vowed to appoint "strict constructionists" and hinted his appointees would be modeled after justices Antonin Scalia and Clarence Thomas. President Bush made no secret his nominees would have the right kind of ideological commitments. Interestingly, he made four nominations to the Court—John Roberts twice, Harriet Miers, and Samuel Alito, Jr.—and all four had significant executive branch experience and strong religious convictions. No doubt, the prior executive experience of these nominees—like that of former nominees like Robert Bork, Douglas Ginsburg, Antonin Scalia, Clarence Thomas, and William Rehnquist—might have been relevant because it might have made the nominees more sympathetic to executive branch claims (and conceivably more dubious about congressional ones) and enabled the president and others responsible for judicial selection to get to know their personal ideological commitments based on first-hand, daily interaction.

Many Republican senators expressly applauded Roberts's and Alito's respective track records of demonstrated ideological commitments. It was no accident that John Roberts and Samuel Alito Jr. were on the short lists of many conservative interest groups which had been monitoring prospective nominees to the Court for the right kinds of ideological commitments. When White House spokespersons, including President Bush, were pushed by several Republican senators and the press to defend the nomination of Harriet Miers, they responded in part by praising her character and emphasizing their confidence she would remain committed to being the kind of justice the president had promised to appoint. Similarly, Senator Michael DeWine (R-OH) expressed pleasure that confirming Alito would bury the Bork precedent and instead show that the Senate will confirm someone with a "conservative" judicial philosophy. When Senator Sam Brownback, among others, publicly said that he cared more about a nominee's judicial philosophy than their professional accomplishments, he was implying that

William Rehnquist (Associate Justice of the Supreme Court); and Sandra Day O'Connor (state appellate court judge in Arizona).

15. The five Catholic justices of the Roberts Court and the presidents who appointed them are John Roberts (President George W. Bush); Samuel Alito, Jr. (President George W. Bush); Antonin Scalia (President Reagan); Clarence Thomas (President George H.W. Bush); and Anthony Kennedy (President Reagan). Justice Thomas did not convert to Catholicism until after his appointment to the Court.

16. President Clinton's two appointees were, of course, Justices Ruth Bader Ginsburg and Stephen Breyer.

the law, on its own, could not constrain someone to decide cases the right way unless that person had the right ideological commitments. Indeed, why else would President Bush not have nominated people to the Court who happened to be politically liberal or active Democrats? The answer is obvious—the nominees' judicial philosophies were indispensable to their selection.

While President Bush and the Republican Senate (as well as their Democratic colleagues and predecessors in office) may not have done anything particularly unique in selecting justices whom they believed had particular ideological commitments, their preoccupation with the ideological purity of their nominees is likely to have produced, or exacerbated, several unintended consequences. Perhaps most importantly, it might have signaled to the American people that they believe ours is not a government of laws but rather a government of people with the right kinds of ideological commitments. Picking justices who share particular judicial philosophies has had the further unintended consequence of confirming the long-held view of political scientists that individual justices' ideological commitments constrain their decision-making much more than the law or those things purporting to be law. Whether political scientists are right that justices vote their policy preferences directly, or manipulate the law to maximize those preferences, is a different matter than whether presidents and many senators happen to believe that is how justices behave.

Some readers might be quick to point out that presidents (and senators) are committed to the law but have had to adapt to the fact that many justices are not. They might argue that President Bush understood that only nominees with the right kind of ideological commitments would follow the law. He may have understood that he would need to take ideology into account to counterbalance the disposition of several justices to follow their personal preferences rather than the law. Indeed, one could argue it would have been irresponsible for the president or senators to ignore this disposition or to fail to protect against it.

This response is unavailing, however, and the signaling of apparent presidential and senatorial agreement that law matters less than ideology remains problematic for at least two reasons. First, preoccupation with ideology to ensure supposed fidelity to the law hardly began with President Bush. There never was some past, golden era in which justices, presidents, and senators approached their respective jobs differently than they do now. Conservatives and liberals and Republicans and Democrats are mistaken if they think any of them is responsible for initiating presidents' or senators' preoccupations with ideology. The fact is that presidents and senators have always believed ideology matters. As I have suggested, the preoccupation with ideology traces back to George Washington, and it includes not only the presidents whose appointments I have described but other noteworthy ones, including Abraham Lincoln, whose principal concern in appointing

five justices was “the effect a proposed Court member might have on the conduct of the war.”¹⁷

Nevertheless, we have to be careful with the inferences we draw from this historical pattern. Presidents and senators usually do not take ideology into account because they know justices will disregard the law. They take ideology into account because they know—but rarely have political incentives for acknowledging—that constitutional law is different than other law. It is not just that the Constitution is the “supreme law of the land” that makes it different. Constitutional law is different because the Constitution—its principal (and, many believe, only) constituent—is unusually indeterminate. The indeterminacy of constitutional law confounds (many) political scientists to no end, but it is indeterminate for many reasons which are understandable to legal scholars (and to the justices and our political leaders).

First, constitutional law is indeterminate because of the nature of the Constitution. A written constitution, like other laws reduced to writing, must be abstract; it must speak in “broad outlines” and generalities as Chief Justice Marshall famously suggested.¹⁸ The abstractness of a written constitution, coupled with its failures to prescribe a preferred mode of interpretation, limit its ability to guide concrete decisions taken in its name, and increase the likelihood of unpredictability in its construction. Second, several practical problems exacerbate the indeterminacy of constitutional law. The Framers and Ratifiers failed to anticipate every contingency, they often failed to reach consensus on more specific language, and they agreed on general terms for different, often complex reasons. As Michael Dorf explains, the difficulty of achieving consensus on more specific language in the Constitution “is particularly problematic for constitutional interpretation. Given profound disagreement, any foundational set of procedures or principles sufficiently abstract to secure consensus and thereby work its way into a popularly chosen constitution will be too abstract to resolve the most acute subsequently arising constitutional controversies.”¹⁹

The text of the Constitution is, however, not the only source of constitutional meaning that is open-ended, lacks consensus on rules for its construction, and is amenable to multiple interpretations. Similarly, the structure of the Constitution raises inferences, but the Constitution does not dictate which inferences ought to be controlling. In a classic dispute that has existed at least as long as the Constitution, some people support construing the Constitution as setting forth the maximum range of areas in which the branches may share power, while others argue that the Constitution limits

17. ABRAHAM, *supra* note 4, at 116.

18. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (stating that a constitution’s “nature . . . requires, that only its great outlines should be marked. . .”).

19. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 884 (2003).

only how much power may be shared by the heads of each branch but not how much may overlap or be shared by officials operating below the apexes. In another longstanding (and ultimately bloodier) dispute, authorities disagreed over the areas in which the federal government is supreme to the states, as well as the scope of state sovereignty protected by the Constitution. The open-ended language of the Constitution, as well as the inferences raised by the Constitution's design, lend themselves to several plausible interpretations; however, the Constitution provides no guidance on how it ought to be interpreted, much less on which one of several plausible interpretations is superior.

Moreover, original meaning is susceptible to more than one interpretation (and to some manipulation).²⁰ People may disagree over whose understandings are relevant for determining original meaning, how the plain meaning of the Constitution ought to be determined, how the popular or common understanding of the Constitution at the time of ratification ought to be determined, at what level of generality original meaning ought to be defined, and how many Framers and Ratifiers need to have agreed on an understanding for it to qualify as a component of original meaning. These questions are difficult to answer because there are no rules for interpreters or those committed to originalism to follow in divining original meaning.²¹

My purpose in raising the indeterminacy of some sources of constitutional meaning is not to suggest that anything goes—or ought to go—when it comes to interpreting the Constitution. There are significant checks on the Court's, as well as other institutions', constitutional decision-making. One check is the gatekeeping function of presidents and senators, who keep each other (as well as the Court) in check. They determine which views ought to be reflected, or which ought not to be reflected, on the Court; and they perform this function because the law—the Constitution—empowers them to exercise it. In practice, presidents and senators gravitate toward nominees not only whom they know, but also who fall within and reflect the mainstream of constitutional thought. Presidents do this because they know such nominees are likelier to be confirmed as opposed to those with radical views, while senators do this because they figure such nominees are likelier to maintain, or at least pose no serious threat to, the constitutional status quo. If, for example, nominees have shown (and seemed disposed to show) disdain for very well-settled precedents and constitutional doctrine, they will encounter more difficulty in being confirmed because many, if not most, senators will infer from their disdain a general disrespect for the law and for maintaining stability, consistency, and predictability in constitutional law. When the Senate confirmed Chief Justice Roberts and Justice

20. See generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) (arguing that no one unified theory explains constitutional law, despite attempts to formulate such a theory).

21. See generally H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987).

Alito, there was no majority of senators expressly supporting their appointments because they believed these nominees promised radical changes in constitutional law. Some Republicans and many Democrats expressly approved the nominations because they found the nominees had shown proper respect for precedent and the law. The Senate approved two nominees who purported to be in, and to reflect, the mainstream of constitutional law as it at least stood in the years in which they were confirmed.

Another significant check on the Court occurs within the Court. This check is an essential dynamic of constitutional adjudication obscured (perhaps purposefully) by the efforts of public leaders to shape public opinion over particular Supreme Court nominations. This dynamic is the golden rule of constitutional law in which the justices appreciate that, once on the Court, they must treat the precedent of others as they would like others to treat the precedents they approve. This golden rule is as old as the Court (indeed, far older than the Court). It helps to explain why, *inter alia*, so much constitutional law endures. The golden rule of constitutional law assures there is not a lot of backsliding in constitutional doctrine. For instance, the Court continues to stand by most of the fundamental rights and the expansions of federal power it has recognized. Hence, the Court's withdrawal of its recognition of a right to contract as a fundamental right²² was unusual in that it has stood by many other fundamental rights it has recognized (such as the rights to marry,²³ to one man-one vote,²⁴ and to not being coerced into sending their children to public schools²⁵); and its recent cut-backs in the scope of Congress's Commerce Clause power are relatively few and far between,²⁶ especially since Congress could use other powers to accomplish the same ends.²⁷

It is natural to wonder what this discussion about indeterminacy has to do with President Bush's and other leaders' unwitting, or unintended, signaling of their agreement with political scientists that the law does not matter to (at least some) Supreme Court justices. The short answer is that they have many incentives to curry favor with, and play to, their bases and few (if any) incentives to engage in protracted discussions of the nuances of constitutional law in public discourse. This incentive structure is likely to

22. The right to contract was most famously recognized in *Lochner v. New York*, 198 U.S. 45 (1905). By 1937, the Court had reduced the level of scrutiny it had used to examine the constitutionality of economic regulation from strict scrutiny to the rational basis test. *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

23. *See Loving v. Virginia*, 388 U.S. 1 (1967).

24. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

25. *See Pierce v. Soc'y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

26. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

27. For instance, the Court has generally deferred to the conditions Congress attaches to its spending measures, including ones requiring states to abandon particular prerogatives. *See generally* *South Dakota v. Dole*, 483 U.S. 203 (1987).

remain unchanged, except perhaps in periods of divided government in which presidents and senators are likelier to press each other harder to become more candid about what they are doing and to cease obfuscating the stakes through misleading platitudes.

This situation leaves others, especially academics, interested in speaking truth to power, with the opportunity (and responsibility) of keeping our leaders in check. Law professors should not allow presidents, senators, or others to get away with obscuring their priorities in judicial appointments or undermining respect for the rule of law, including the golden rule of constitutional law. If law professors do not believe that the law is meaningless in constitutional adjudication, they should say so. If they believe that precedents or the golden rule of constitutional law matters, they should say so. And, if they disagree with political scientists who maintain that ideology matters more than law in determining outcomes in constitutional adjudication, they should not remain silent, particularly when political leaders appear to be expressing agreement with the political scientists. When law professors sign letters—or take public positions—opposing nominees because of their ideology, they need to explain how their opposition squares with their respect for (and fidelity to) the rule of law. Any law professors who believe, like I do, that constitutional adjudication and interpretation are more complex than our leaders or many political scientists allow, should express themselves accordingly. And if legal scholars are committed to speaking truth to power, they should not conduct themselves in accordance with the view that the law is meaningless unless they agree with that perspective. When scholars speak truth to power, we have a responsibility to expose obfuscations in public discourse, to be candid about the justifications or consequences of particular decisions, and to expose misdirection for what it is (unless we approve the misdirection and have the courage and candor to explain why).

Up until this point, the relevance of the current majority's religious faith might not be, however, apparent. In the next part, I explain why the nominees' faith may have had something to do with their ideological commitments and been instrumental to their selection.

III. WHY THE CATHOLIC MAJORITY ON THE ROBERTS COURT MAY BE UNCONSTITUTIONAL

The second longest period in our history without a vacancy arising on the Court just came to an end. It occurred in the time between Justice White's departure from the Court in 1994 and Chief Justice Rehnquist's death in 2005. During this period, party tensions intensified over the prospect of one or two openings arising on the Court, and President George W. Bush and his advisers anxiously prepared to make the most of the opportunities they expected to have to tip the Court's balance further to the right.

For five years, President George W. Bush and his counselors labored to solve the puzzle of how to pick justices who would remain rigidly committed to the course of decision-making they preferred. They understood that nominees' talking the talk was an insufficient basis for ensuring that nominees had and would faithfully adhere to the right kinds of ideological commitments over time. President Bush's apparent solution was to pick people with rock-solid moral character, including (as we shall see) deep-rooted religious convictions. The challenge was to find people who outwardly lived their convictions, who exhibited consciences morally bound by their church's fundamental and official teachings,²⁸ and whose characters were inextricably linked to and defined by moral faith—and thus were incorruptible, hostile to liberal values, and rigidly opposed to jurisprudential or philosophical laxity. In this regard, justices Scalia and Thomas were models not just because of their jurisprudential outlooks, but also their moral characters in which their respective constitutional outlooks were firmly grounded (if not derived).

While it may not be readily apparent why the president's or senators' selection criteria may have been unconstitutional, it should become clearer once I sketch some possible constitutional limits on the selection process and how the current Catholic majority would likely apply these limitations. First, Article VI of the Constitution expressly provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."²⁹ The second possible limitation is the Fifth Amendment,³⁰ which subjects federal governmental action to strict scrutiny if it is expressly based on a suspect classification such as race. Yet another possible limitation may be the First Amendment, which prohibits any law "respecting an establishment of religion."³¹ Thus, President Bush and his counselors might have acted unconstitutionally if they had a "religious test" for Supreme Court selection or based Supreme Court nominations on either religious affiliation (thereby furthering the establishment of religion) or a suspect classification (requiring the application of strict scrutiny).

28. I am grateful to Steve Shiffrin for calling my attention to two Catholic traditions, one consisting of those accepting the Magisterium's precepts (assuming they and their levels of authority are known) as morally binding in conscience and the other regarding it as the right and duty of Catholics to follow their consciences when it is contrary to the Magisterium. See LINDA HOGAN, *CONFRONTING THE TRUTH: CONSCIENCE IN THE CATHOLIC TRADITION* (2000); *CONSCIENCE: READINGS IN MORAL THEOLOGY* No. 14 (Charles E. Curran ed., 2004). It is possible that President Bush (and his advisers) may have gravitated toward Roberts and Alito as nominees because they are, in effect, what some call "Vatican Catholics," while the president may have had confidence in Miers because she adhered to an analogous religious tradition requiring her to objectively manifest her adherence to certain religious precepts consistent with certain constitutional outcomes and positions. For some interesting statistics on political and other attitudes of contemporary Catholics in the United States, see ANDREW GREELEY, *THE CATHOLIC REVOLUTION: NEW WINE, OLD WINESKINS, AND THE SECOND VATICAN COUNCIL* (2004).

29. U.S. CONST. art. VI, cl. 3.

30. *Id.* amend. V.

31. *Id.* amend. I.

The constitutional problems with the selection process may become clearer if we examine how the Roberts Court, including its Catholic majority, would assess the constitutionality of an expressed preference for either Catholics or nominees with particular religious convictions. First, consider how the plain meaning approach might work here. Justice Scalia insists, for example, on adhering to the plain meaning of the text of the Constitution; and Article VI, by its plain language, straightforwardly prohibits religious tests for federal office. Indeed, it is hard to imagine clearer constitutional language than that which appears in Article VI³²—it categorically restricts religious tests, just as the Sixth Amendment categorically requires confrontation of witnesses in every criminal prosecution, a prohibition Justice Scalia maintains should be construed as written as an absolute prohibition applicable expressly to “all criminal prosecutions,” regardless of the circumstances.³³

It is possible that some justices may consider construing the “religious test” language of Article VI more narrowly. Some might argue, for example, that Article VI should be construed only as a restriction on formally requiring candidates to federal offices to pledge fidelity to a particular faith. The difficulty with this construction is that it may be hard to reconcile with the plain meaning of the clause and some justices’ adherence to the plain meaning of the Constitution in other contexts (such as in the Freedom of Speech and Confrontation Clause cases).

To further appreciate how the Catholic majority would likely analyze the constitutionality of a selection scheme like that which (might have) produced it, it may be useful to consider how the five Catholic justices would analyze a case in which *everyone* selected for a particular federal job (say, a contractor) was African-American. This outcome could be attributable to three possible schemes. First, all African-Americans were chosen explicitly on the basis of their race, in which case the Court would subject the selection scheme to strict scrutiny and uphold it only if it had a compelling justification. Second, all African-Americans were chosen on the basis of neutral criteria, but the selection scheme had a disproportionate racial impact, in which case the Court would follow *Washington v. Davis*³⁴ to subject that scheme only to the rational basis test in the absence of proof it was adopted because of, rather in spite of, the disproportionate impact it had.³⁵ Third, the African-Americans were chosen pursuant to a scheme in which race was one of many factors. For the current Catholic majority, two of these three schemes are unconstitutional, particularly if it were to subject the third scheme to strict scrutiny along the lines of the reasoning in the dissent in

32. *Id.* art. VI.

33. *Id.* amend. VI; see, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

34. 426 U.S. 229 (1976).

35. See *Personnel Adm’r. of Mass. v. Feeney*, 442 U.S. 256 (1979).

Grutter v. Bollinger.³⁶ The current majority would not need to overrule *Grutter* in order to employ this analysis, since the analysis is the same, and thus analogous to the level of scrutiny, as employed by the Court in such earlier cases as *Adarand Constructors, Inc. v. Pena*,³⁷ and *City of Richmond v. J.A. Croson Co.*³⁸

Replacing race with religion is likely to produce the same outcome under the Fifth Amendment. For at least some justices, religion may constitute a suspect basis for a classification scheme. Say, for example, a law required that at least five seats on the Court be set aside for Jews. Such a classification would likely satisfy most if not all the factors recognized by the Court for establishing suspect classifications, including, but not limited to, being the product of bigotry or prejudice and stereotyping. If a religion-based classification scheme were subject to strict scrutiny, the Court would unlikely recognize compelling justifications for it.

Though some justices might use rational basis rather than heightened scrutiny because of their preference to use strict scrutiny only for race-based classifications, they might still strike the religious-based classification down. The reason is that they might be disposed to conclude that a classification based expressly on adherence to one religious faith or a set of religious convictions reflects animus or prejudice toward other religions. They might find no plausible justification for a classification scheme that disqualifies many otherwise qualified people from consideration simply because of their religious faiths.

If we were to analyze the constitutionality of the nominations of Chief Justice Roberts, Justice Alito, and Harriet Miers under the framework outlined above, the outcome should be obvious. Once again, there are only three possibilities: first, if we assume the president chose all three explicitly on the basis of their religion, the nominations would violate the plain meaning of Article VI's prohibition of religious tests and would trigger either strict scrutiny under the Fifth Amendment or fail the rational basis test. There is no conceivable compelling justification for basing Supreme Court selections on someone's being Catholic. Nor, for that matter, is there a plausible justification (at least that a Court might be inclined to approve) for disqualifying large numbers of otherwise qualified people for a seat on the Court because of their religious faiths.

Second, a scheme in which all three nominees were chosen from a small group of qualified nominees (set apart by shared judicial philosophies) pursuant to some neutral criteria, is probably not constitutionally problematic. Under the latter circumstances, *Washington v. Davis* (and its progeny) would likely control. In the absence of evidence that the justices

36. 539 U.S. 306 (2003).

37. 515 U.S. 200 (1995).

38. 488 U.S. 469 (1989).

were chosen in spite of rather than because of a discriminatory impact, their selections would likely be subjected only to the rational basis test and easily pass muster.

Third, if the president and senators used religion or religious convictions as one of many factors in their selection, the question is whether the Court might treat the selection criteria as suspect. If so, the nominations would fail to pass constitutional muster. If, however, justices treated the selection system as not suspect, they would have to show how the selection scheme differs from the one which they subjected to strict scrutiny in *Grutter*. If they could not make the latter showing, they would have to strike the scheme down. Hence, there is a good chance that two of the three possible selection schemes under which Chief Justice Roberts and Justice Alito were nominated may have been unconstitutional.

As I have suggested, however, some justices (perhaps justices Scalia and Thomas) might treat the selection in *Grutter* as race-based and thus triggering strict scrutiny but the scheme used to select the Catholic majority as non-race-based and thus triggering only the rational basis test. Even if this were to happen, there might still be a majority on the Court disposed to strike the selection scheme down. It is easy to imagine other justices—justices Stevens, Breyer, Souter, and Ginsburg, for example—joining at least some of the new Catholic majority to strike down such a classification scheme for violating the First Amendment's prohibition against the establishment of religion, the Fifth Amendment's equal protection component, or maybe both. Recall that at least until recently there was a majority on the Court committed to striking down laws that a majority found endorsed religion, and a selection scheme that gives explicit preference to religious beliefs or affiliation plainly endorses at least some religion.³⁹ A similar majority might be persuaded to strike down a law expressly favoring religion as violating the Fifth Amendment because it lacked either a compelling justification (as a suspect classification) or at least the neutral basis that the rational basis test requires.⁴⁰

The only remaining question is which of the three possible scenarios President Bush's Supreme Court nominations fits into (and which, if any of the schemes, the selections of justices Scalia and Thomas may fall into as well). Some evidence suggests the possibility of either the first or third of these scenarios, both of which involve arguably unconstitutional selection schemes. First, recall some suggestive statistics: all five of the current Catholic majority of the Court were appointed by Republican presidents determined to lower the wall of separation between church and state (and to weaken *Roe*). Perhaps more tellingly, President Bush's four nominees to the

39. See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005).

40. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996).

Court—John Roberts twice, Harriet Miers, and Samuel Alito Jr.—had at least two things in common: all four had substantial experience in the executive branch and all four had strong Christian convictions.

If these statistics do not shift the burden of persuasion to the administration, then we can turn to stronger, more direct evidence of unconstitutional behavior—the candid admissions of the president and his advisers. It is rare for a president or his counselors to speak as openly as they did about Harriet Miers, but what they said was significant: the first thing President Bush's close counselor, Karl Rove, publicly said about Miers's nomination was that she was an Evangelical Christian and that this fact ought to appease Christian conservatives concerned about her ideological commitments. He was quoted as mentioning this in telephone conversations with interested and concerned interest group leaders, particularly those from conservative Christian organizations that had helped to vet prospective nominees to the Court. (We can only imagine what he may have said in private, non-telephonic conversations.) The president said that he knew Harriet Miers's "heart" and was confident that she would be the same person twenty years from now as she was now. One of Miers's fiercest defenders, Nathan Hecht of the Texas Supreme Court, spoke publicly at the White House's urging about Miers's religious conversion, the strength of her current faith, and his confidence that on the all-important question of *Roe* her faith would make it impossible for her to do anything other than to vote to reverse *Roe*.

Maybe those people who do not want to believe a president (or at least this president) could act unconstitutionally dismiss these comments, or take them to mean something different than what they possibly suggest. They might believe that holding the right kinds of moral commitments to judging might coincide with holding particular religious beliefs, rather than the other way around. We know, however, that President Bush cared about Miers's religion, because he and others in his administration told us so. We know many Republican senators supporting Chief Justice Roberts and Justice Alito repeatedly praised their "characters" and "hearts"—terms loaded with meaning, standing, in all likelihood, for how these senators expected the nominees to rule once they were on the Court. We know President Bush was looking for nominees with judicial philosophies grounded in something impervious to change; he was looking for nominees whose judicial philosophies were not just manifestations of abstract commitments but rather were consistent with—if not grounded in, and inextricably linked to—certain other, unshakeable moral commitments. He may have wanted nominees who did not internalize their religious faith but rather attempted to live outwardly in accordance with particular religious traditions;⁴¹ people, in other words, with a certain kind of moral character, which required resisting both

41. See *supra* note 28 and accompanying text.

changing attitudes, and currying favor with the liberal elite. President Bush wanted people, as he suggested about Miers, who would remain rigidly committed to certain moral values for all time. President Bush picked Supreme Court nominees who, he had good reason to believe, lived their faiths as he lives his faith, who objectively manifested moral characters (and beliefs and conduct) consistent with conservative constitutional construction, and who would be morally repulsed by the kind of judging that led to upholding abortion rights, to restricting school prayer, and to skepticism of strong, unilateral executive action. If the nominees' religious personas were pertinent as evidence, or proof, that they had the right kinds of moral characters or commitments in order to be nominated to the Court (and not the other way around), then it seems that he and his staff may have acted unconstitutionally.

IV. THE NEXT TIME

It is naïve to think that politics does not inform presidents' Supreme Court nominations. Of course it does. The issue is not whether presidents try to fulfill certain political objectives with their appointments to the Court, but rather how they may (and do) seek to fulfill such objectives. The question is how they may do this without running into particular constitutional difficulties.

The first thing to keep in mind is that the Constitution, including Article VI, applies as much to the president as it does to the Congress. But, in the context of judicial appointments, the president must still adhere to Article VI but without the likely prospect of judicial review. A president's approach to judicial selection is a prime example of the Constitution outside the Court. Just because the Court declines to review the president's actions does not mean the president may do whatever he wants, regardless of what the Constitution says. It means, instead, that different checks are available to keep him in line. We saw some of those checks employed in response to the administration's apparently express consideration of Miers's religious faith as a basis for her nomination to the Court. No sooner had White House officials spoken publicly of her religion in support of her nomination than more than a few newspapers around the country, legal scholars, and senators from both parties responded with concern that the administration may have violated Article VI's prohibition of the use of religious tests for office. The president withdrew the nomination for many reasons, possibly including the desire not to protract the conflict generated by his administration's apparently explicit consideration of religion as a positive factor in the nomination process.

Checks and balances, even with the Supreme Court selection process, require the willingness of each branch not only to operate within its respective constitutional boundaries but also to monitor the other branches and to

keep them in check. Keeping each other in check depends in turn on the branches' awareness of what each other is doing, or not doing. Hence, Miers's fate is a reminder of the facts that the enforcement of Article VI generally depends on our political leaders' awareness of what each other is doing. If President Bush had not publicized his selection criteria, it would have been purely a matter of speculation whether, or to what extent, he took religion into consideration in making his Supreme Court nominations. But once he made his reliance on, or consideration of, religion known, other public authorities could respond accordingly. Previously when, as Sheldon Goldman reminds us, President Eisenhower explicitly directed his Attorney General to find a qualified Catholic for the Court,⁴² senators could suspect (or maybe acquiesce) in his express consideration of William Brennan's Catholicity as a positive factor in support of his nomination to the Court. Any of us who are skeptical whenever government explicitly uses race or gender as a basis for a selection scheme should not let presidents or senators off the hook. As commentators did with the Miers nomination, we should not hesitate to speak truth to power that somewhere within the circumstances under consideration, the Constitution may have been sacrificed, even if it was done inadvertently or unnecessarily.

Speaking truth to power is important as a check on the selection process in two other ways. The first is that it is needed to expose hidden or coded messages in public rhetoric. While the president and others may have used references to "character" or "heart" to avoid open warfare over recent Supreme Court nominations, I suspect these references were not chosen by happenstance. They had special meanings to people in the know (partly informed, no doubt, by private communications with the White House and talking points distributed by the White House or people close to the White House). Law professors, among others, had a special responsibility to decipher the rhetoric, especially if we knew if it had been intended to mislead and distract the public and the Senate from the primary objectives of the nominations. While these references may have helped to diffuse or deflect conflict, they did so at the expense of furthering people's distrust in their government. Coded rhetoric simply empowers the people in the know—the small constituency to whom the coded rhetoric was addressed. Otherwise, the references may have deceived the rest of the American people into thinking that maybe judicial ideology or philosophy may not have had much to do with the nominations when they may have been first-order selection criterion. Even for the public, which expected (maybe hoped) the administration would take judicial ideology into account, the coded rhetoric precludes them from praising these nominations for shifting the Court further to the right. The president and others will have a hard time claiming the significance of these nominations in terms of their judicial outlooks when

42. See Goldman, *supra* note 1.

they made every effort not to defend, or explain, them in ideological or philosophical terms.

Speaking truth to power is perhaps most important as a check, albeit not a terribly strong one, to ensure greater candor in the selection process. Presidents and senators ought to specify, as openly as possible, their respective criteria for evaluating Supreme Court nominees. Since presidents and senators employ particular criteria, then they should say so. Sunlight, as Justice Brandeis liked to say, is the best disinfectant. Whatever the criteria may be, senators and the public ought to know, so they may evaluate the criteria. If ideology is important to our leaders, they ought to say so, and they ought to explain which ideology they prefer and why. If character matters to them, they need to explain what they mean by character, why it ought to be important in Supreme Court (or other judicial) selection, and whether “character,” as they understand it, works to the benefit of nominees of both parties or only the nominees they like.

Last but not least, our leaders should take the rule of law seriously. It is not a convenience. Over the past quarter century, our national leaders have often professed their respect for the rule of law—whether it be in the Clinton impeachment proceedings, the policies designed to thwart terrorism in the United States, or the judicial selection process. The rule of law includes the Constitution as well as the Court’s rulings and the golden rule of constitutional law, which requires granting the same degree of respect for the precedents of others, which we would like to see given to those we like. We expect all our leaders, not just those on the Supreme Court, to abide by the rule of law. The choice of Supreme Court justices is no exception. It should be done pursuant to the rule of law, which requires that nominees’ religions are incidental to, not the basis for, their nominations to the Supreme Court.

I close with a challenge. I may be wrong; I actually hope that I am. But, ask yourselves whether you agree with the scholars and the politicians who maintain that moral character ought to be the basis for Supreme Court selection. If you agree with them, then ask whether your understanding of the appropriate moral character for appointment to the Court is broad enough to include people who construe the Constitution differently than you do. If not, then you may have to recognize that for you moral character is a proxy for something else—judicial ideology, in all likelihood—and that you apparently do not believe, for whatever reason, that the law has the capacity to keep justices in line. For law can only matter—or at least it most matters—when it does not have to depend on the politics of the people who are charged with its enforcement or interpretation. If, however, your conception of the requisite moral character for Supreme Court nominees does

not favor people with particular sets of political beliefs or judicial ideologies, then you may believe that law, at least sometimes, does matter, and that it has the capacity, at least sometimes, to constrain interpreters, regardless of their political convictions. The choice as to which conception of moral character is pertinent to Supreme Court selection is for the president to make but for all of us (including the Senate) to evaluate.